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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

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In re Patent Application. of :

HARVEY *et al.*

Serial No.: 08/487,526

Filed: June 7, 1995

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Attorney Docket No. 5634.355

Confirmation No. 7792

TC/A.U.: 2614

Examiner: David E. HARVEY

Customer No. 21967

OFFICE OF PETITIONS

For: SIGNAL PROCESSING APPARATUS AND METHODS

PETITION TO THE DIRECTOR UNDER 37 C.F.R. § 1.181

Mail Stop Petition
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

This petition is a request that the Director of Patents and Trademarks ("Director") for the U.S. Patent and Trademark Office ("PTO") exercise his supervisory authority over the Examiner and require him to produce an Examiner's Answer in response to the Appeal Brief filed March 7, 2005, in the above-referenced patent application. A petition requesting similar relief is being simultaneously filed in U.S. Patent Application Serial No. 08/470,571.

The PTO's unreasonable delays are described in detail below. A \$400.00 fee for filing this Petition is enclosed herewith. Under the provisions of 37 C.F.R. § 1.181(f), this petition is believed to be timely filed.

I. Introduction

In the present case, Applicants filed an Appellant's Appeal Brief on March 7, 2005. To date, some five months later, the PTO has failed to respond with an Examiner's Answer or other appropriate PTO action. Applicants respectfully request that the Director exercise his authority

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over the Examiner and require the issuance of an Examiner's Answer so that Applicants' Appeal may proceed.

II. Statement of The Facts Involved

The PTO's failure to timely respond to Appellant's Appeal Brief in the instant application is yet another unfortunate example of the PTO's repeated delays and improper actions in handling this application and Applicants' related applications. The long history of PTO delays is detailed in the attached Memorandum In Support Of Applicants' Petition (Attachment 1). As noted in the Memorandum, the PTO issued a Suspension of Action in Applicants' related cases, but explicitly excluded the present case (08/487,526 (MULT)) and related case 08/470,571 (INTE) from the suspension stating that they "will not be suspended in order to pursue the issues that have been fully developed in these applications." See, e.g., Notice of Suspension of Action, mailed January 6, 2005 in Applicants' related case serial no.: 08/447,447.

Thus, the PTO's stated strategy was to suspend a number of Applicants' co-pending applications while common issues would be resolved by allowing the INTE/MULT applications to proceed to an adjudication before the Board. Thus, the disposal of these issues in INTE/MULT would effectively resolve those common issues with respect to the many suspended co-pending applications.

However, the PTO's inaction in the INTE/MULT appealed cases completely undermines this approach. In fact, the PTO's inaction in the INTE and MULT cases is an improper *de facto* suspension of action. Applicants respectfully request that the Director remove this *de facto* suspension of action and issue an Examiner's Answer. Otherwise, all of Applicants' applications will be under the yoke of PTO suspensions, both actual and *de facto*.

As noted above, Applicants filed an Appellant's Appeal Brief on March 7, 2005. As stated in the Manual of Patent Examining Procedure (MPEP) § 1208, "[t]he Examiner should furnish the appellant with a written statement in answer to the appellant's brief within 2 months after receipt of the brief by the Examiner." According to the PTO's Patent Application

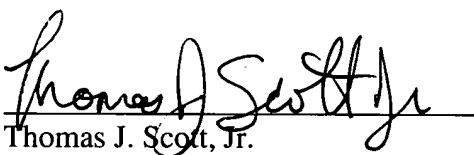
Information Retrieval (PAIR) system, the Appeal Brief was received by the PTO on March 7, 2005. It is now some five months since Applicants filed their Appeal Brief and some three months past the 2 month Examiner's Answer due date.

III. Requested Relief

Applicants respectfully request that the Director exercise his authority over the Examiner and issue a written Examiner's Answer in the above-captioned case within thirty (30) days.

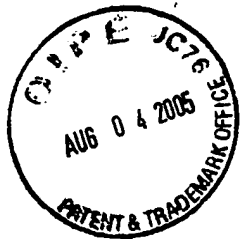
Respectfully submitted,

HUNTON & WILLIAMS LLP

By: 
Thomas J. Scott, Jr.
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Dated: August 4, 2005

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OFFICE OF PETITIONS

For: SIGNAL PROCESSING APPARATUS AND METHODS

MEMORANDUM IN SUPPORT OF APPLICANTS' PETITION TO THE DIRECTOR
UNDER 37 C.F.R. § 1.181

Mail Stop Petition
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

I. Introduction

Applicants file the attached Petition and this supporting Memorandum following the PTO's repeated delays and improper actions in handling this application and Applicants' related applications. Although the Group Director purportedly is directly supervising this application and Applicants' related applications in an effort to expedite their consideration, the PTO's actions (and inaction) establish the opposite: they are not being considered on an expedited basis or even on a "normal" basis. Rather, the PTO has imposed repeated, improper delays during the past 10 years and future delays are expected absent immediate action.

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The PTO has purposefully delayed prosecution of this application and the Related Applications at every turn, in direct violation of the Manual of Patent Examining Procedure's ("MPEP") mandate for examination under section 701. In response to each delay, Applicants diligently answered and complied with, or strenuously objected to when deemed necessary, each and every request and requirement from the PTO, regardless of how onerous. Applicants diligently sought to advance and accelerate the examination process by making every effort -- regardless of time, cost and manpower -- to meet the PTO's demands. Applicants have expended an extraordinary amount of resources -- including \$2 million dollars in PTO fees alone -- thus far in responding to all of the PTO's improper delays. Applicants have an unwavering commitment to the advancement, continued examination and eventual allowance of this and the other related applications, and have exhibited as much through their diligent and timely responses, comprehensive support, and a spirit of cooperation and compliance throughout the entire prosecution history. As made evident below, the PTO is responsible for the delay in examination of this and the related applications, through either its actions or, frequently, inaction. These applications have been pending for almost 10 years from the filing date of June 6, 1995. Attached is a time line of the prosecution activities for Applicants' pending applications (Attachment 1).

The PTO purports to be dedicated to improving customer service and identifies reduction of pendency and quality of patents as primary objectives. But the PTO's unwillingness to comply with its own rules and procedures led to this abhorrent situation. Accordingly, the

Director must exercise his supervisory authority to correct this injustice, as further inaction and prejudicial delay undoubtedly will continue absent the Director's intervention.

II. The Prosecution Activities for This and Related Applications

Between March 1995 and June 1995, Applicants filed 328 United States patent applications. Each of these applications was a continuation application under then Rule 60 (37 C.F.R. §1.60) of U.S. Patent Application Serial No. 113,329, filed August 30, 1993, claiming the benefit of U.S. Patent Application Serial No. 317,510, filed November 3, 1981, in the name of Harvey and Cuddihy and entitled "Signal Processing Apparatus and Methods" (Harvey 1981 Application), through U.S. Patent Application, Serial No. 096,096, also entitled "Signal Processing Apparatus and Methods," filed on September 11, 1987 in the name of John C. Harvey and James W. Cuddihy (Harvey 1987 Application).¹ Applicants in good faith directed the claims in each Rule 60 application to distinct subject matter, as is described in greater detail below.

The present application was filed June 7, 1995 as a continuation application claiming the benefit under 35 U.S.C. § 120 of the Harvey 1987 Application. The Harvey 1987 Application is a continuation-in-part application claiming the benefit under 35 U.S.C. § 120 of the Harvey 1981 Application. The present application claims, under 35 U.S.C. § 120, the benefit of the filing date of the Harvey 1981 Application because all of the claims of the present application are supported by the earlier Harvey 1981 Application. Seven United States patents have issued to date based

¹ All applications were filed before the June 8, 1995, effective date of those provisions of the Uruguay Round Agreements Act, Pub. L. No. 103-465, § 532, 108 Stat. 4983 (1994), which modified the effective term of issued U.S. patents to 20 years from the earliest effective filing date for the application under 35 U.S.C. § 120.

on either the Harvey 1981 Application or the Harvey 1987 Application.²

The PTO initially rejected the various related applications based on improper double patenting type rejections.³ The PTO also issued office action rejections based on Applicants' alleged failure to comply with 35 U.S.C. § 112 and § 120. Assignee, Personalized Media Communications, L.L.C. ("PMC"), diligently responded to each of the approximately 700 Office Actions mailed in the related applications and, in all respects, vigorously pursued the allowance of each application. Applicants were positioned to officially appeal the issues to the Board of Patent Appeals and Interferences. However, after receiving Applicants' Appeal Briefs, the PTO withdrew its double patenting rejections. By November 1998, nine applications were allowed, the issue fee was paid in six applications, and numerous other applications included claims directed to subject matter indicated to be allowable.⁴ Nonetheless, despite the PTO's clear indication in 1998 that dozens of applications contained allowable subject matter, only one application issued (i.e., U.S. Patent 5,887,243).

² U.S. Patent No. 4,694,490; U.S. Patent No. 5,233,654; U.S. Patent No. 4,704,725; U.S. Patent No. 5,335,277; U.S. Patent No. 4,965,825; U.S. Patent No. 5,887,243; and U.S. Patent No. 5,109,414.

³ The PTO applied *Schneller* double patenting rejections or "non-statutory type" double patenting rejections based on a judicially created doctrine grounded in public policy and primarily intended to prevent prolongation of the patent term by prohibiting claims in a second patent not patentably distinguishable from claims in a first patent. This type of double patenting rejection is rare and limited to particular facts of the case. *In re Schneller*, 397 F. 2d 350 (CCPA 1968).

⁴ The issue fee was paid in applications 08/444,788; 08/447,415; 08/472,980; 08/480,060 08/488,438; and 08/484,858. A Notice of Allowance was also received in applications 08/438,216; 08/448,644; and 08/485,283.

A. The PTO Asked PMC to Consolidate Its Pending Applications and Assured PMC the Applications Would Receive Expedited Examination

The PTO's massive restructuring in 1997-98 contributed significantly to a delay in examination of the 329 applications. During the restructuring, the PTO issued notices of six-month suspensions of examination in at least 212 of the 329 original applications. *See* Attachment 2.

At the same time, the PTO began to express difficulties in examining the number of related applications. On October 7, 1997, Examiner Andrew Faile, in an Interview with Thomas J. Scott, Jr. and Examiners David Harvey and Jason Chan, asked PMC to group the applications into related subject matter groupings, abandon some applications, or consolidate its applications so that claims concerning similar subject matter could be examined by a single examiner. PMC agreed to do so, in an effort to expedite prosecution of its pending applications. In an October 10, 1997, meeting between Mr. Scott, John C. Harvey, and Examiners Faile, Chan, and David Harvey, PMC gave the PTO (1) a brief description of 17 proposed subject matter groupings, and (2) a listing of the applications in those categories. Co-Inventor John Harvey also advised the examiners of 52 additional detailed category groupings that could be provided to the PTO at a later date.

On November 24, 1998, Examiner Faile asked PMC's counsel for more detailed information about the subject-matter categories for the pending 329 applications. Additionally, senior PTO management stated that further examination of Applicants' related applications

would be expedited if the number of pending applications were reduced. Thus, Applicants agreed to consolidate the claims in all pending applications into just 56 subject matter groups.

On November 25, 1998, PMC met with Examiner Faile to discuss further proceedings on PMC's applications. PMC gave Examiner Faile a document entitled "Analysis of PMC Application Claims by Subject Matter Categories." See Attachment 3. The 56 subject matter groups in the document categorize the claims of the Applicants' applications based on the general subject matter to which the claims are addressed. Each PMC application has its own subject matter identification that defines the specific, distinct subject matter presented in that application. For organizational purposes, Applicants grouped the applications into general subject matter categories. For example, the general subject matter category "ADVT" is addressed to systems that present advertising at receiver sites, and the general category "ASIN" is addressed to systems for assembling information and instructions at a receiver site. Under these general subject matter categories, each application had a specific subject matter to which its claims were addressed.

Examiner Faile then asked that the claims in the various PMC applications in each of the 56 groups be consolidated further into one or two applications for each category. Examiner Faile also assured Applicants that no restriction requirements would be warranted or would issue as a result of combining different claims into one application. Examiner Faile stated that, after resolving §112 and general double patenting issues for each group, any rejections on art or otherwise would then be resolved for that group by the responsible examiners and Applicants' representatives.

After the November 1998 interviews, Applicants gave Examiner Faile additional detailed information on the status of all of PMC's applications. In a final interview on prosecution procedures with Examiner Faile on February 25, 1999, the parties produced a flowchart to govern the "consolidation" of the various claims into a limited number of applications, as well as their examinations by PTO examiners. The flowchart on the consolidation process is attached to this Petition as Attachment 4. Examiner Faile stated that this consolidation of Applicants' groupings would *accelerate* the overall prosecution process. More specifically, the consolidation process was presented as a method of ensuring consistency where a few examiners would be familiar with the subject matter and would act quickly on these applications.

PMC agreed to the PTO-requested consolidation procedure to facilitate more rapid consideration of PMC's claims and more rapid issuance of PMC patents. PMC complied with the PTO's request to consolidate the pending applications because of the PTO's promises that doing so would expedite prosecution by helping examiners recognize the patentable demarcation between these related applications.

In meetings between the PTO and PMC representatives, the parties agreed to preserve certain applications in an active pending status (referred to by PMC and the PTO as a "Primary Application," discussed further below). If, for some reason, PMC and the PTO were unable to reach an agreement as to the allowance of certain claims in the active applications, the corresponding pending application (referred to as a "Secondary Application," discussed below) for that same subject matter category would provide a vehicle for appeal of those claims to the PTO Board of Patent Appeals and not delay issuance of the allowable claims.

As a result of these discussions to consolidate PMC's applications, the PTO suspended prosecution of all pending PMC applications pending completion of consolidation. By March 2, 1999, PMC and the PTO agreed upon a consolidation method and schedule.

B. The Consolidation Agreement and Schedule

Under the consolidation agreement developed by the PTO and PMC, PMC's 329 pending applications were reduced to 79 primary applications (the "Primary Applications") and organized into 56 subject matter-based groupings. PMC also maintained 79 secondary applications (the "Secondary Applications") as pending and agreed to hold the Secondary Applications in abeyance awaiting the outcome of the prosecution of the Primary Applications. This process cost PMC more than \$500,000 in new filing and other PTO fees, and more than \$1 million in attorneys' fees.

Pursuant to the agreed-upon procedure, PMC began in Spring 1999 to consolidate its various applications, with assistance from Supervisory Examiner Faile, who used an Interview Summary Sheet to effect the consolidation. *See* Attachment 5. In each case, the surviving applications were amended to include all claims for a particular subject matter grouping and the other applications were either expressly abandoned or allowed to be abandoned by failure to respond to an outstanding PTO action.

In early Summer 1999, the PTO and Applicants' representatives compiled a priority list for the consideration of the various groups and an interview procedure for evaluation of Applicants' applications. *See* Attachment 6. The PTO decided to assign a group of examiners under the general direction of Supervisory Examiner Faile, Art Group 2712, and Supervisory

Examiner Tommy P. Chin, Art Group 2713, to follow the specified procedure of interviews so as to clarify any issues pursuant to 35 U.S.C. §112 or the relevant art, and to generate Office Actions. During this process, numerous applications in which the PTO previously noted allowable subject matter, or in which the PTO previously indicated were allowable but for which issue fee documentation had not been mailed, were consolidated in one or more of the 56 subject matter groupings so that the various claims could be evaluated and issued together under the PTO's new procedure.

The PTO and PMC agreed that each of the consolidated cases would be reviewed on its merits and that an Office Action would issue within 6 weeks after PMC completed the consolidation of that case. *See* Attachment 7. According to this process, the PTO and PMC would meet on "day 1" to discuss the claims to be consolidated into an application. After a series of interviews with examiners, PMC would consolidate the claims and file the required amendments to the affected applications by "day 29." The PTO would issue an Office Action on the consolidated application by "day 36." The PTO and PMC agreed that the PTO would not delay the review of a completed application until all 79 cases were fully consolidated. Additionally, the PTO was aware that 14 cases would not be amended during the consolidation process and could be reviewed immediately.

C. The Delays Begin

PMC began delivering the consolidation amendments to the PTO on March 4, 1999, just two days after the PTO and PMC agreed on the consolidation method and schedule. Shortly thereafter, though, the PTO refused to meet with PMC to continue the consolidation process.

Nevertheless, PMC continued its efforts and, by June of that year, 37 cases were consolidated and ready for review on the merits. PMC finished the consolidation process for the remaining 42 cases by June 28, 2000, after a slight delay caused by the transfer of the pending cases from the law firm of Howrey & Simon to Hunton & Williams during 2000.

In Spring 1999, PMC believed that examination of the consolidated applications was progressing. However, by Summer of 1999,⁵ PMC was concerned that the PTO was not reviewing PMC's applications expeditiously as promised in the consolidation agreement, and counsel for PMC met with Director Dwyer to communicate this concern. Indeed, the PTO waited until April 2000 to issue the first action on the merits of any of the 37 applications that were consolidated by June 1999. Additionally, while the PTO previously agreed that multiple teams of examiners would examine the 79 applications, the responsibility for examining all of the co-pending cases devolved on Examiner Luther. To make matters worse, Examiner Luther inexplicably refuted the existence of any consolidation agreement between the PTO and PMC. Examiner Luther later conceded that the PTO agreed to the consolidation process. Examiner Luther acknowledged the existence of the consolidation agreement, albeit while accusing PMC of delaying the consolidation. In the interview summary mailed June 8, 2000 (Attachment 8), Examiner Luther requests Applicants to finalize consolidation, although Applicants had completed this process by the time the Interview Summary was mailed.

⁵ Around this time, the PTO had indicated to Applicants that it intended to withdraw allowed applications. Applicants paid the issue fee in these allowed applications and firmly believed that withdrawal was improper. Applicants vigorously disputed the PTO's intentions, as detailed below.

Moreover, before the consolidation effort began in the Spring of 1999, the PTO issued notices of allowance for six (6) of PMC's related applications ("Allowed Applications"). PMC timely paid the issue fees and one application issued as a patent, U.S. Patent No. 5,887,243. The remaining five Allowed Applications were in condition to be issued as letters patent. In fact, one was even assigned a patent number and issue date. The allowed applications were not to be subject to the consolidation process, as prosecution was closed in these applications. However, after PMC began the consolidation effort, the PTO reversed its position, announcing that it intended to withdraw the remaining five Allowed Applications from issuance. The PTO also required PMC to consolidate claims from the Allowed Applications into the 79 consolidated cases. The PTO's action to withdraw allowed applications in which the issue fees were paid was completely inconsistent with PMC and the PTO's mutual understanding of the consolidation effort.

Applicants believed that the Allowed Applications should not have been withdrawn: 35 U.S.C. § 151 provides that, upon payment of the issue fee, "the patent shall issue." Thus, an application cannot be withdrawn from issue after payment of the issue fee consistent with 35 U.S.C. § 151 unless there has been a determination that a least one of the conditions specified at 37 C.F.R. § 1.313 (b)(1) through (4)⁶ exist such that the applicant is no longer "entitled to a patent under law."

⁶ 35 U.S.C. 151 and 37 C.F.R. 1.313(b) do not authorize the PTO to withdraw an application from issue after payment of the issue fee for any reason except (1) mistake by the Office, (2) a violation of 37 C.F.R. 1.56, or illegality in the application, (3) unpatentability of one or more claims, or (4) for interference.

Additionally, while the consolidated examination process was a means to expedite prosecution, it was counterproductive to applications that already were allowed. These applications were already fully examined by independent examiners, who conducted thorough prior art searches. Based on the result of the searches and analysis, the claims in these applications were deemed to be allowable. In withdrawing the Allowed Applications from issue, the PTO identified no new issues that had been raised nor was any new prior art discovered and deemed relevant to the allowed claims. Instead, it was the PTO's desire to subject the already allowed applications to the consolidation process for reconsideration. MPEP § 1308 clearly states that an application should not be withdrawn from issue after payment of the issue fee at the Office's initiation merely "to permit the examiner to consider whether one or more claims are unpatentable." Thus, it was improper to include these Allowed Applications in the consolidation process for reconsideration and withdraw them from issue after payment of the issue fee.

The PTO and PMC held a series of interviews on this issue on June 16, 1999, July 1, 1999, and July 13, 1999. At these interviews, the examiners stated that the claims should not issue because one or more claims were unpatentable under either 35 U.S.C. §§ 102, 103 or 112, *i.e.*, not patentable over U.S. Patent No. 4,536,791 to John G. Campbell *et al.*, or not properly supported in the original Harvey 1981 or Harvey 1987 Application specifications as required by 35 U.S.C. §112. Director James L. Dwyer stated that the claims should be amended to address the Examiners' concerns, but failed to give Applicants any further details as to the specific basis for reversing the determination of allowability and withdrawing the Allowed Applications from

issue. In fact, Director Dwyer stated his preference for amending the claims and allowing the applications to issue rather than withdrawing the allowed applications.

Despite the PTO's failure to state specific grounds for the determinations of unpatentability, and in an effort to provide as much information as possible to the PTO so as to advance the prosecution, Applicants on August 5, 1999, submitted amendments under 37 C.F.R. §1.312 for certain of the Allowed Applications, making detailed arguments against their withdrawal. These submissions are attached to the Petition as Attachments 9-12. But, on November 4, 1999, Director Dwyer issued a letter withdrawing four of the Allowed Applications from issuance. The PTO did not provide any explanation for the withdrawal, stating only that the applications were withdrawn due to unpatentability of one or more of the claims and citing prior art that the Examiner already had considered. The PTO's notice stated that the withdrawn Allowed Applications would be forwarded to the examiner for prompt appropriate action, including notifying applicant of the new status of the withdrawn applications. A copy of this letter is attached to this Petition as Attachment 13. PMC has since abandoned these withdrawn Allowed Applications and their claims were consolidated into other pending applications.

However, one of these previously Allowed Applications remains pending, but was "missing." PMC paid the issue fee for Application No. 08/444,788 on November 19, 1998. Inexplicably, though, the PTO claimed that it could not find this remaining case at the time Group Director Dwyer's letter was mailed. During a conversation with Applicants' representative on February 2002, Examiner Faile stated that this application was withdrawn from issue on June 8, 2000, and faxed Applicants the withdrawal notice on February 22, 2002, *twenty*

months after it was drafted but *never mailed or received* by Applicants. Attachment 14. This was the first notice Applicants received that the PTO had “found” the application and withdrawn it from issue. The Notice of Withdrawal stated that application was to be “forwarded to the examiner for prompt appropriate action.” No action was mailed until July 30, 2003. This application remains pending.

D. Examiner Luther’s Further Delays

1. Examiner Luther’s Administrative Requirement

In 1998, the PTO imposed a so-called “Administrative Requirement” that required Applicants to resolve potential double patenting issues between copending applications. The PTO stated non-compliance with this unprecedented requirement would result in the abandonment of Applicants’ applications. At this stage, it was apparent that despite all Applicants’ efforts the Examiner was refusing to deal with Applicants in good faith. On January 7, 2000, Examiner Luther improperly re-imposed the Administrative Requirement on PMC’s INTE claims (the instant application). Around the same time, he also imposed this Administrative Requirement on a number of other Related Applications. Examiner Luther’s Administrative Requirement improperly compelled Applicants to either: (1) file a terminal disclaimer in all co-pending Related Applications, not just the instant application, without regard to the subject matter claimed therein; (2) provide an affidavit attesting that no conflicts exist in any of the co-pending applications; or (3) resolve all conflicts in all of Applicants’ co-pending applications by identifying how the claims in the instant application are distinct and separate inventions from all claims in all Applicants’ co-pending applications.

In essence, Examiner Luther improperly sought to require Applicants to relieve him from his MPEP-mandated obligation to examine the applications for such conflicts. Incredibly, the Examiner based this requirement on the purportedly large number of co-pending claims. But, contrary to the Examiner's assertions (and as described above), Applicants had undertaken every effort to ease any burden on the Examiner by consolidating claims of pending applications into subject matter groupings with common subject matter and submitting extensive documentation to assist the Examiner in analyzing and comparing the claims. PMC did this at the PTO's direction. Yet, despite all of Applicants' efforts, the Examiner imposed this improper Administrative Requirement as a condition of allowance: Applicants' failure to comply with this improper requirement would result in abandonment. In doing so, the Examiner exceeded his authority and acted contrary to PTO rules and procedures.

Applicants addressed Examiner Luther's Administrative Requirement by submitting a comprehensive petition to the Commissioner under 37 C.F.R. § 1.181 ("the First 181 Petition") to invoke his supervisory authority over the Examiner, on March 2000. See Attachment 15. Demonstrating the PTO's propensity for delay, this petition requested expedited examination and prompt responses from the PTO on the pending applications--but the petition itself was left pending for more than three years with absolutely no action or even any acknowledgement from the PTO. Finally, in March 2002, about two years after filing the First 181 Petition, PMC voluntarily withdrew it to advance prosecution. Attachment 16. The PTO, though, has failed to uphold its promises of prosecution advancement -- the very basis for Applicants' withdrawal of the First 181 Petition. It now is five years since the submission of the First 181 Petition

requesting expedited and prompt examination and Applicants again are forced to make the same requests, now with an even more egregious background of prosecution delays directly attributable to the PTO.

2. Examiner Luther's Notices of Non-Responsiveness and Notices of Abandonment

Around June 2000, the PTO issued 37 Notices of Non-Responsiveness for applications in which PMC filed responses to Office Actions from November 1997 through September 1999. Examiner Luther issued these notices despite Applicants' submission of comprehensive and thorough responses. For example, the PTO raised allegations of a lack of support under 35 U.S.C. § 112 by providing a litany of random terms from the claims. Applicants' responses refuted the allegations and addressed all of the Examiner's concerns. Applicants also submitted extensive charts clearly establishing proper support for all claim language. In each case, Applicants' response included arguments stating the specific reasons why the claims were patentable and further included a first chart showing (1) claim language, (2) citation to the Harvey 1987 Specification in column, line format, (3) actual language from the Harvey 1981 Specification; (4) citations to the Harvey 1987 Specification in column, line format, and (5) actual language from the Harvey 1987 Specification. A second chart was provided that showed where the Harvey 1981 Specification language was supported by the Harvey 1987 Specification, in response to the Examiner's contention that the '81 specification was "not carried forward" into the Harvey 1987 Specification. Thus, Applicants' responses clearly showed a bona fide attempt

to advance the application to final action and Examiner Luther's Notices of Non-Responsiveness were not warranted.

Procedurally, the Examiner's issuance of these improper notices was patently unfair because it make response and compliance impossible for Applicants. For example, in the Notice of Non-Responsiveness mailed June 8, 2000, Examiner Luther stated that Applicants' May 5, 1998, response was not fully responsive because "applicants deliberately omitted identification of instant support for Section 112 rejections by, *inter alia*, identifying sentences, paragraphs and passages that do not exist in the instant disclosure." Thus, while admitting that PMC in fact filed a response addressing the 35 U.S.C. § 112 rejections raised in a prior Office Action, Examiner Luther apparently believed that certain sections, which he never identified, were missing. The Examiner further stated that, "[s]ince the period for reply has expired, the application will become abandoned unless applicant corrects the deficiency." Yet, the Examiner then stated that "the period for reply set forth in the prior Office action has expired" and limited Applicants' reply time to the "SIX (6) MONTH statutory period" based on the "date for reply set forth in an Office Action." The Examiner waited close to two years to address Applicants' response, improperly concluding that it was non-responsive, and limited Applicants' response time to six months from the date of the Office Action mailed in November 5, 1997, all the while acknowledging that the response time had fully expired. The Examiner made any response to the Notice of Non-Responsiveness procedurally impossible. In short, the Examiner imposed the proverbial Catch-22 that would make it impossible to keep the applications alive no matter what Applicants did. In short, the Examiner's action was not only unjustified--it was unjust.

The Notices of Non-Responsiveness were improper both procedurally and substantively. Under 37 C.F.R. § 1.111(b), in order to be entitled to reconsideration or further examination, the applicant must reply to the Office action. Non-compliance with this section is recognized as a general allegation without specifically pointing out how the language of the claims patentably distinguishes them from the references. That clearly did not occur here where Applicants provided extensive responses to the office actions.

3. The “Luther Attachment”

In January 2001, Examiner Luther issued Notices of Non-Responsiveness in eight of the consolidated Primary Applications. At the same time, he issued Notices of Abandonment in 24 of the consolidated Secondary Applications.⁷ In the first such case, PMC received the “Luther Attachment,” which purportedly formed the basis of the Notices of Non-Responsiveness. The Luther Attachment is a diatribe⁸ containing nothing more than a series of allegations of inequitable conduct, fraud, intentional misconduct and misrepresentation, and numerous other highly inflammatory statements. In the other cases, Examiner Luther attached a modified version of the Luther Attachment to the Notices of Non-Responsiveness. Both documents included a number of irrelevant exhibits, including Mr. Scott’s Hunton & Williams website biography and pages from PMC’s website.

⁷ Examiner Luther issued Notices of Abandonment in the Secondary Applications even though the PTO assured PMC, as part of the Consolidation Agreement, that it would hold the Secondary Applications in abeyance pending action on the Primary Applications. The is yet one more example of the PTO’s failure to abide by the procedures agreed-upon with PMC.

⁸ The Luther Attachment is close to 40 pages with over 575 pages of exhibits.

Around March 2001, PMC received Notices of Non-Responsiveness in another 24 Primary Applications and 30 Secondary Applications, purportedly based upon PMC's alleged failure to respond to the PTO's improper Administrative Requirement (*see above*). These Notices of Non-Responsiveness did not contain allegations of misconduct. The PTO filed another 26 Notices of Non-Responsiveness containing allegations of misconduct in late August to early September 2001. These Notices of Non-Responsiveness included the modified Luther Attachment.

The Notices of Non-responsiveness failed to provide a proper reason for non-responsiveness, *i.e.*, that (a) the amendment to claims fails to comply with 37 C.F.R. 1.121 which outlines the manner of making amendments; (b) the paper is unsigned; (c) the paper is signed by someone who is not of record; or (d) use of an improper type of paper. Instead, Examiner Luther referred Applicants to his 550-page Luther Attachment, without articulating any coherent basis for non-responsiveness or, in other cases, basis for abandonment. The Notices of Abandonment suffered from the same defect.

The Luther Attachment is replete with allegations of every type of fraud and misconduct imaginable. Examiner Luther delivers all of this in a highly accusatory tone, with exaggerated fonts in mid-sentence for emphasis. The Luther Attachment's unfounded allegations are confrontational and highly inflammatory. Nothing in the Luther Attachment comes close to stating a valid reason for issuing the notices of non-responsiveness and abandonment. In fact, many statements are completely unrelated to the issues of non-responsiveness and abandonment. Moreover, Examiner Luther falsely accuses Applicants of misconduct. In addition, the Luther

Attachment contains many irrelevant exhibits and references that serve no logical purpose. For example, Examiner Luther makes a reference to Bill Clinton and Monica Lewinsky and attaches Mr. Scott's Hunton & Williams website biography, along with an amicus curae brief filed in an unrelated litigation.

It is important to note that *none* of the accusations of Applicants' misconduct have been proven and *none* are true. As baseless as these accusations were, Applicants nevertheless were forced to address the outrageous allegations made of record by Examiner Luther. After devoting additional time, effort and expense, PMC refuted the Luther Attachments which should never have been made of record--and the PTO ultimately withdrew the Luther Attachments from the prosecution record. PMC's effort in addressing the PTO's improper actions imposed an enormous burden on Applicants. Further, such frivolous and baseless impediments cost Applicants valuable time and resources. More specifically, these applications have been pending for close to 10 years from the 1995 filing date. Applicants have spent millions of dollars in PTO fees, legal expenses and other associated costs. Responding to the Luther Attachments was a further imposition in time and cost for PMC in an overall prosecution record already replete with unfair delay.

4. PMC's Response to the PTO's Notices of Non-Responsiveness and Notices of Abandonment

In response to the 2001 Notices of Non-Responsiveness, PMC filed an Amendment and Reply providing the responsiveness of the previous responses and supplying additional responses to any alleged deficiencies. In response to the 2001 Notices of Abandonment, PMC filed

Petitions asking the Commissioner to invoke his supervisory authority under 37 C.F.R. § 1.181 (the “Second 181 Petition”) to withdraw abandonment or, alternatively, to revive the applications as unintentionally abandoned.

By April 2002, the PTO withdrew the Notices of Non-Responsiveness and Abandonment, thus rendering the Luther Attachments legal nullities. *See e.g.*, Attachment 17. Additionally, the Supervisory Examiner entered an Interview Summary in the files of each of the PMC applications that had received the Luther Attachment, acknowledging that the allegations made in and conclusions drawn from the Luther Attachment were unrelated to the issue of patentability and not made pursuant to a duty of the Examiner imposed by law. Since then, Examiner Luther has not appeared in any of Applicants’ cases.

E. The Delays Continue

1. The PTO Improperly Applied the Priority Issue to Delay Prosecution and Deny Applicants A Proper Examination

Under the Consolidation Agreement, the PTO had agreed to consider PMC’s “MULT” (the present case) and “INTE” claims before considering others. The INTE claims cover “methods of integrating remote with local processing and imaging,” while the MULT claims cover “coordination of multi-channel/media and multi-media presentations.” Various senior PTO management, and in particular, Director Dwyer, promised that the PTO would issue an office action in the INTE and MULT claims in early October 1999. Attachment 18. The PTO, though, failed to do so until July 2002.

On July 17 and July 30, 2002, the PTO issued Office Actions in INTE and MULT, respectively, rejecting the claims under 35 U.S.C. § 112, first and second paragraphs, making numerous prior art rejections, and disputing PMC's view of the relevant legal standards applicable to PMC's priority claim under 35 U.S.C. § 120. Specifically, the Examiner rejected all claims under 35 U.S.C. § 112, first paragraph, as containing subject matter that was not sufficiently described in the specification. In making these rejections, though, the Examiner did nothing more than identify specific limitations pending in a given claim and state that "it [was] not clear where the disclosure as originally filed described the recited step/process"

The rejections contained absolutely no analysis, reference or discussion of any of the teachings found in Applicants' specifications disclosing the various systems and methods for enabling a presentation of programming at subscriber stations. Instead, the Examiner simply quoted various passages from orders issued in litigation before the ITC involving certain of Applicants' issued patents, which characterized Applicants' 1987 specification as "difficult to understand." Because the Examiner failed to provide any reason or analysis as to *why* Applicants' claims were not sufficiently supported under 35 U.S.C. § 112, first paragraph, the Examiner failed to meet his burden to sustain such a rejection. The PTO had waited over two (2) years to issue this Office Action which involved little, if any, detailed thought or analysis. Clearly, the overriding intention was to continue to delay prosecution rather than address the claims on their merits.

The PTO continued to issue a blanket rejection of all the claims in all the applications by summarily concluding that Applicants are not entitled to the '81 filing date, even in applications

that expressly claim priority to the '87 filing date.⁹ In other cases, the PTO has inexplicably required PMC to prove priority to the '81 filing date, even when no intervening art was applied to warrant such a showing. In fact, none of the claims were individually addressed in these actions.

Notwithstanding the impropriety of the PTO's position, Applicants submitted extensive support charts unequivocally establishing proper support to the '81 filing date. However, the PTO effectively ignored Applicant's clear proof and maintained the same baseless rejections.

However, the Federal Circuit has determined that an Examiner has the initial burden of presenting a *prima facie* case of unpatentability by:

“[P]resenting evidence or reasons why persons skilled in the art would not recognize in the disclosure a description of the invention defined by the claims.” . . . [T]he burden placed on the examiner varies, depending on what the applicant claims. If the applicant claims embodiments of the invention that are completely outside the scope of the specification, then the examiner or Board need only establish this fact to make out a *prima facie* case. If, on the other hand, the specification contains a description of the claimed invention, albeit not *in ipsius verbis* (in the identical words), then the examiner or Board, in order to meet the burden of proof, must provide reasons why one of ordinary skill in the art would not consider the description sufficient. Once the examiner or Board carries the burden of making out a *prima facie* case of unpatentability, “the burden of coming forward with evidence shifts to the applicant.” . . . [to] show that the invention is adequately described to one skilled in the art.

In re Alton, 76 F.3d 1168, 1175 (Fed. Cir. 1996) (citations omitted).

⁹ The absence of reasoning or detailed analysis to support the blanket rejections is demonstrated by the very fact that the PTO was disputing priority to the Harvey 1981 Specification in pending applications *where PMC was not even seeking priority to that 1981 date*.

As *Alton* makes clear, the Examiner's burden varies in making a valid rejection under § 112, first paragraph. In the Office Action, the Examiner failed to meet the most lenient burden described in *Alton*. The Examiner failed to establish (or even assert) that Applicants' claims or specific limitations in Applicants' claims were completely outside the scope of the specification; instead, the Examiner simply identified specific claim limitations and requested "clarification."

Nevertheless, Applicants responded by pointing out where in the specification the relevant disclosure supported the claimed subject matter. For example, Applicants repeatedly identified relevant portions of the specification supporting concepts recited in currently pending independent claims. The Examiner never addressed why Applicants' specification support was insufficient to satisfy § 112, first paragraph. Accordingly, under the standard set forth in *Alton*, the Examiner failed to meet his burden to "provide reasons why one of ordinary skill in the art would not consider the description sufficient." *Alton*, 76 F.3d at 1175.

Notwithstanding the Examiner's failure to meet his burden for making a proper rejection of Applicants' pending claims under § 112, first paragraph, Applicants provided charts identifying detailed written description support for each and every limitation of the pending claims. The support identified in charts, together with Applicants' discussion regarding how each claim is supported in Applicants' 1987 specification, clearly demonstrated that the claimed subject matter is described in the specification in such a way as to reasonably convey to one skilled in the art that Applicants had possession of the claimed inventions. Rather than responding to Applicants' response, the PTO shifted course and improperly issued Notices of Suspension.

III. The Current Notices of Suspension are Improper and Baseless

The PTO mailed Notices of Suspension in 93 applications in January 2005. Each of the Notices of Suspensions state as follows:

The instant application has a specification that is identical to one or more patents that are currently under reexamination. The issues present in the reexamination proceedings are related to the issues in the instant application. The final decisions/determinations made at the end of the reexamination proceedings are likely to affect the outcome of the application. To this end, it is appropriate to suspend prosecution on the instant application.

Per applicant's request, however, prosecution in 08/470,571 (INTE) and 08/487,526 (MULT) will not be suspended in order to pursue the issues that have been fully developed in these applications. The outcome of these issues are also likely to affect the outcome of the present application.

Thus, the PTO suspended the applications (1) because a patent with the same specification is under reexamination¹⁰ and (2) the INTE and MULT appeals may affect the outcome of the current applications.

In an teleconference with Applicants' representative, Examiner Faile had first raised the possible suspension of prosecution on August 15, 2002. On August 7, 2003, Applicants' representative, Joseph Guiliano, sent a detailed email to Examiner Faile explaining why suspension would be improper and highly prejudicial. Attachment 19. After months of inactivity from the PTO, PMC contacted Examiner Faile on November 3, 2003 regarding the PTO's possible suspension, but failed to receive a response. PMC again emailed Examiner Faile on November 20, 2003 and February 12, 2004, but again received no response from the PTO.

¹⁰ Applicants' seven issued patents have been under reexamination since 2003.

PMC did, though, receive a draft notice of suspension that the PTO mistakenly mailed to Applicants. The draft notice of suspension indicates that, in July 2003, Examiner Faile had drafted at least one notice of suspension. Thus, it appears that as early as July 2003, the PTO already had contemplated or even decided to suspend prosecution, but waited until January 2005 to finally officially mail the notices of suspension. Due to the PTO's delay and inaction, prosecution effectively was suspended during the PTO's decision-making period between July 2003 and January 2005. Now, the PTO is improperly suspending prosecution "officially" for an additional six months.

The PTO's reasons for suspension lack foundation and amount to nothing more than yet another improper delay contrary to law and prejudicial to Applicants. First, because of the ensuing delay and increased pendency, the MPEP permits Office-initiated suspensions in only two instances: (1) when the PTO is awaiting a new reference under ¶ 7.52 and (2) once claims are deemed allowable, when possible interference is detected under ¶ 7.53. Neither situation applies here.

Second, the MPEP states that a second or subsequent suspension should be imposed only in an "extraordinary circumstance." The current suspension is in fact the second (or third?) suspension and, thus, must present an "extraordinary circumstance" to be warranted. No such circumstance exists.

The fact that the current applications have the same specification as a patent currently under reexamination does not present such an extraordinary circumstance. In a reexamination proceeding, the claims are at issue, not the entire specification. A reexamination proceeding is

directed to examination of **any claim** of the patent on the basis of prior art patents or printed publications. 35 U.S.C. § 301, 37 C.F.R. § 1.501. While certain prior art may be relevant to a certain claim, it certainly does not follow that the same prior art is relevant to an entirely different claim of a separate application, regardless of whether the specifications are the same. Additionally, a request for reexamination requires that a substantial new question of patentability exist with regard to at least one patent claim. MPEP § 2209. Thus, reexamination proceedings are directed to the claims and questions of patentability affecting a claim, not the specification in its entirety. As clearly articulated in MPEP § 2258, claims in a reexamination proceeding will be examined on the basis of patents or printed publications, and any issues under 35 U.S.C. § 112 are limited to subject matter added or deleted in the reexamination proceeding. Thus, the fact that the current applications have the same specification as a patent currently under reexamination does not present an “extraordinary circumstance.”

Moreover, while the claims here share a common specification with a patent under reexamination, the claims under reexamination are different from the claims pending in the patent applications. Similarly, as illustrated by the second exemplary instance justifying suspension under MPEP § 709, once claims are deemed allowable, a potential interference may be detected, thereby requiring a comparison of the **claimed** invention, not the specification. And, such a suspension is initiated at allowance. As the claims in this application are still pending and theoretically subject to possible claim amendments, it is unfair to hold Applicants strictly to the claims. The patents under reexamination address distinct inventions defined by their claims and do not control the claimed subject matter of the pending applications, regardless

of whether a common specification is shared. Obviously, the PTO recognizes that a single specification may support different claims to different inventions. Therefore, the PTO's reason for suspension is contrary to its own policies and mandates.

The PTO fails to identify a proper grounds for suspension. Its actions are contrary to the MPEP's statutory mandate for examination. Under 37 C.F.R. § 131 and MPEP § 701, the Director shall cause an examination to be made of the application and the alleged new invention, and if on such examination it appears that the applicant is entitled to a patent under the law, the Director shall issue a patent therefor. Further, under 35 U.S.C. § 132, on examination, when any claim for a patent is rejected, the Director shall state the reasons for such rejection. By suspending the applications for no reason, the PTO is in direct violation of its statutory mandates.

There is simply no justification in law or policy for suspending PMC's pending applications on the basis of patents in reexamination. Considering that these applications have been pending for approximately 10 years based on PTO delay makes the suspension even more offensive to notions of basic fairness.

IV. Applicants' Patent Applications are Unfairly Targeted

In March 2000, the PTO implemented a second review program for all allowed business method applications and now utilizes a Sensitive Application Warning System ("SAWS") to identify and monitor patent applications that may have a significant impact on the marketplace.¹¹

¹¹ Kim, Chua Siak, Wee Swee Teow & Co, *Patenting Business Methods*, Endnote 6.

SAWS uses an internal flag for potentially “controversial” patent applications, which is applied to the PTO’s docketing system. The Applicant is not informed that his/her application has been flagged for special attention. It appears that SAWS is implemented Office wide, and not limited to business method applications in Class 705.

Applicants are concerned that this internal flag was applied to all of PMC’s pending applications and currently is being used as yet another basis to detrimentally delay prosecution.

V. The Examiner’s Answer Is Overdue

The PTO’s failure to timely respond to Appellant’s Appeal Brief in the instant application is yet another example of the PTO’s repeated delays and improper actions in handling this application and Applicants’ related applications. As noted above, the PTO issued a Suspension of Action in the above-noted related cases, but explicitly excluded the present case (08/487,526 (MULT)) and related case 08/470,571 (INTE) from the suspension stating that they “will not be suspended in order to pursue the issues that have been fully developed in these applications.” However, the PTO’s inaction in the INTE and MULT cases is an improper *de facto* suspension of action. Applicants respectfully request that the Director remove this *de facto* suspension of action and direct the Examiner to promptly issue an Examiner’s Answer or allow the instant application.

As noted above, Applicants filed an Appellant’s Appeal Brief on March 7, 2005. As stated in the Manual of Patent Examining Procedure (MPEP) § 1208, “[t]he Examiner should furnish the appellant with a written statement in answer to the appellant’s brief within 2 months after receipt of the brief by the Examiner.” According to the PTO’s Patent Application

Information Retrieval (PAIR) system, the Appeal Brief was received by the PTO on March 7, 2005. It is now some five months since Applicants filed their Appeal Brief and some two months past the 2 month Examiner's Answer due date.

VI. The Pending Applications are Entitled to Special Status and Should be Treated Accordingly

The present application was filed June 7, 1995 and claims priority under 35 U.S.C. § 120 to an application filed on September 11, 1987. Section 708.01(i) of the MPEP designates such an application as a "special case", requiring that it be taken out of turn. Under MPEP § 707.02, any application that has been pending five years should be carefully studied by the supervisory patent examiner and every effort should be made to complete its prosecution. To accomplish this result, the application must be considered "special."

Each of Applicants' 111¹² related co-pending applications has an effective pendency of well over five years and, thus, must be treated as "special" under MPEP §§ 708.01(i) and 707.02. In fact, though, the PTO has delayed action on these applications, contrary to the MPEP's mandate. The record in this application, as demonstrated above, includes no indication that anyone exercising authority at the PTO has ever considered the present application or any related application to be "special" and treated it accordingly. To the contrary, the Examiners responsible for these applications have delayed all actions regarding this application and Applicants' Related Applications. These delays are inexcusable and contrary to the PTO's own rules and procedures

¹² There originally were 328 pending applications. After consolidation and abandonment of some applications, there now are 111 pending applications.

regarding the handling of "special" cases. The delays are directly attributable to the PTO; Applicants have diligently sought to advance and accelerate the examination process.

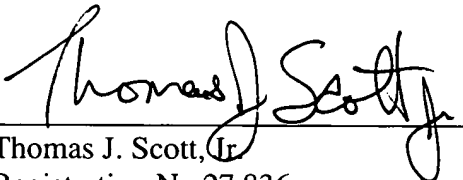
VII. Relief Requested

In view of the above, the Director must exercise his supervisory authority to correct this situation. Applicants respectfully submit the attached Petition requesting that the Director exercise his authority over the Examiner and issue a written Examiner's Answer in the above-captioned case.

Respectfully submitted,

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Attachments

1. Time Line of Prosecution Activities
2. Example Initial Notice of Suspension
3. Analysis of PMC Application Claims By Subject Matter Categories.
4. Flowchart of Consolidation Process.
5. Template Interview Summary Attachment to Effect Consolidation.
6. Priority List for Patent and Trademark Office Consideration of Subject Matter Groups
7. Interview Procedure Flowchart.
8. June 8, 2000, Interview Summary.
9. Request to Enter Amendment After Notice of Allowance and After Payment of Issue Fee Under 37 C.F.R. § 1.312(A) for Application 08/447,415.
10. Request to Consider Amendment After Notice of Allowance and After Payment of Issue Fee Under 37 C.F.R. § 1.312(A) for Application 08/488,438.
11. Request to Enter Amendment After Notice of Allowance and After Payment of Issue Fee Under 37 C.F.R. § 1.312(A) for Application 08/484,858.
12. Request to Enter Amendment After Notice of Allowance and After Payment of Issue Fee Under 37 C.F.R. § 1.312(A) for Application 08/472,980.
13. Notice of Withdrawal From Issue of Applications 08/484,858; 08/488,438; 08/472,980; and 08/447,415.
14. Notice of Withdrawal From Issue of Application No. 08/444,788
15. Petition to the Commissioner Under 37 C.F.R. § 1.181 Filed March 7, 2000.
16. Withdrawal of Petition Under 37 C.F.R. § 1.181 Filed March 7, 2000.
17. Example Interview Summary Withdrawing Notice of Nonresponsiveness in Application 08/435,757.
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